BLANK PAGE

Office-Supreme Court, U.S.
FILED
APR 25 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 1112

JOSEPH SIMMONS, JR., DAVID SIMMONS, CLARENCE TOUGAW and VIOLA TOUGAW, and those similarly situated,
Appellants,

v.

CHIEF EAGLE SEELATSEE, individually and as Chairman of the Yakima Tribal Council, and the YAKIMA TRIBAL COUNCIL OF THE CONFEDERATED BANDS AND TRIBES OF THE YAKIMA NATION,
Appellees,

UNITED STATES OF AMERICA,
Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS and/or AFFIRM

L. FREDERICK PAUL
1804 Washington Building
Seattle, Washington 98101
Counsel for Appellants

METROPOLITAN PRESS SEATTLE, WASHINGTON

BLANK
PAGE

SUBJECT INDEX

	Page
Argument	1

TABLE OF CASES

Ballinger v. Frost, 216 U.S. 240 (1910)	5
Creek Nation v. United States, 302 U.S. 620 (1938)	4
Heckman v. United States, 224 U.S. 413 (1911)	4
LaClair v. United States, 184 Fed. 128 (E.D. Wash.) (1910)	4
Sizemore v. Brady, 235 U.S. 441 (1913)	5
United States v. Rowell, 243 U.S. 464 (1917)	4, 5

STATUTES

25 U.S. Code 348	3, 4

BLANK
PAGE

IN THE

Supreme Court of the United States

October Term, 1965

No. 1112

JOSEPH SIMMONS, JR., DAVID SIMMONS,
CLARENCE TOUGAW and VIOLA TOUGAW,
and those similarily situated,
Appellants,

v.

CHIEF EAGLE SEELATSEE,
individually and as Chairman of the
Yakima Tribal Council, and the
YAKIMA TRIBAL COUNCIL OF THE CONFEDERATED
BANDS AND TRIBES OF THE YAKIMA NATION,
Appellees,

UNITED STATES OF AMERICA,
Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS and/or AFFIRM

ARGUMENT

It is amazing how a dispute can be narrowed to the crux of the matter by the briefs. We suggest that the statement in the Appellees' brief at page 7 poses the main problem, as follows:

"*Shoshone Tribe v. United States*, 299 U.S. 476

(1937), cited in the Jurisdictional Statement, is not controlling. To constitute 'an appropriation of property with in the meaning of the Fifth Amendment,' it should appear that the aggrieved part(y) has a property right. .The Shoshone Tribe did. *The Appellants do not.*" (Emphasis supplied.)

In determining what rights the Appellants have, we thought it would be helpful to set forth the patent as follows:

"447486 4-1063-R

"9626-14 I.O.

"THE UNITED STATES OF AMERICA

"3839

"TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

"WHEREAS, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that Lucy Simmons, an Indian of the Yakima Reservation, has been allotted the following—described land:

"The lots one and two of Section one in Township eight north of Range twenty-one east of the Willamette Meridian, Washington, containing seventy-nine and ninety-six hundredths acres:

"NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the Land above described, and hereby declares that it does and will hold the Land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian and at the expiration of said period the United States will convey the same by patent to said Indian in fee, dis-

charged of said trust and free from all charge and incumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said Land, or cause said Land to be sold for the benefit of said heirs as provided by law; and there is reserved from the lands hereby allotted, a right of way thereon for ditches or canals constructed by the authority of the United States.

"IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the City of Washington, the twentieth day of October in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States the one hundred and fortieth.

"By the President: WOODROW WILSON
"By M. P. LEROY, Secretary
"L. Q. C. LAMAR
"Recorder of the General Land Office

"RECORD OF PATENTS: Patent Number 494606"

This, of course, parallels the authority granted the Secretary of the Interior in 25 U.S. Code 348(J.S.17).

Appellants assert that whenever a person in the United States receives a patent running to himself and to his heirs, *he has a vested property right*, free from expropriation and certainly free from full governmental expropriation which is discriminatory as to him. He cannot be singled out and treated differently than other persons in the United States (disregarding invasions for his benefit).

The Appellee Tribal Council in the trial court tried to justify the escheatment to the Tribe because of its spontaneously—created right of "reversion;" the Solocitor General states a similar idea when he calls the instant property "tribal." There is no case authority supporting such a thought. Moreover an examination of 25 U.S. Code 348 (J.S.17 & 18) belies such agrument. Thus, as to *unallotted* tribal property "The Secretary of the Interior (may) negotiate • • • for the purchase and release • • • of such portions of its reservation not allotted • • •." *Hence the allotment statute contemplates the full divestment of the Tribe's rights when land is allotted,* negotiation for a release by the Tribe being necessary only for the *unallotted* land. Judge Whitson in *LaClair v. United States,* (1910) 184 Fed. 128, 129 (E.D. Wash) called the allotment system "• • • the taking of lands in severalty • • •."

This court in *Heckman v. United States,* (1911) 224 U.S. 413 at page 438 called an allottee's rights as "proprietary," and at page 439 assumes the United States has no "pecuniary" interest in the allotment, having an interest only as "guardian."

In *Creek Nation v. United States,* 302 U.S. 620 (1938) the issuance of allotments to neighboring Indians was a sufficient divestment as to constitute a "taking" of Creek property.

In discussing Congress' plenary control as related to the allotment system, the court in *United States v. Rowell,* (1917) 243 U.S. 464, 468, limited the same, commenting that Congress had no power to violate "fundamental

rights." Indeed the whole basis of *Rowell* is that had Rowell's application ripened, he could have invoked the doctrine that "rights created by carrying them into effect (i.e., the fulfillment of the statute by the issuance of an allotment patent) cannot be divested or impaired." Accord, *Sizemore v. Brady*, (1913) 235 U.S. 441, 450.

Ballinger v. Frost, (1910) 216 U.S. 240 best sets the instant case at rest. An applicant for an allotment had fully qualified for the same but the Secretary had refused to issue it. In ordering a writ of mandamus for the patent, the court stated at page 248:

> "• • • We have no disposition to minimize the authority or control of the Secretary of the Interior and the court should be reluctant to interfere with his action. But as said by Mr. Justice Field in *Cornelius v. Kessel*, 128 U.S. 456, 461:
>
> " 'The Power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a *vested* interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.' " (Emphasis supplied).

To be sure, the contest in *Frost* was between the Secretary and an applicant for an allotment; here, it is between an allottee and the Congress. But the Constitution inhibits

the Congress as to "vested" rights just as much as it inhibits an executive officer.

To put the Solicitor General's argument in ~~content~~ context: "Here the tribal restrictions on succession are designed to protect the Tribe in its reservation free of undue dilution" by taking *vested* property and giving it to the Tribe. It is time the judiciary acted to correct such.

We agree that this cause can be summarily decided.[1]

Respectfully submitted,

L. FREDERICK PAUL
Counsel for Appellants
1804 Washington Building
Seattle, Washington 98101

1. We pass by the Appellees' Motion relating to jurisdiction, relying on the District Court's opinion (J.S. 25-29). Significantly the Solicitor General ignored the point, too.

END